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February 1, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Appeal*

Name of Case: Worker Appeal

Date of Filing: September 13, 2004

Case No.: TIA-0200

XXXXXXXXXX(the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant's late husband (the Worker) was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

*I. Background*

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program.<sup>1</sup>

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<sup>1</sup> [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy)

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act - Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B.

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

#### B. Procedural Background

The Worker was employed as a construction painter at DOE's Savannah River site. The Worker worked at the site for a period of about 20 months, between 1955 and 1962.

The Applicant filed an application with OWA, requesting physician panel review of five illnesses - asbestosis, lung cancer, chronic obstructive pulmonary disease (COPD), skin cancer, and mycosis fungoides.

The Physician Panel rendered a negative determination on each claimed illness, but it rendered a positive determination on pleural plaques, a condition associated with asbestos exposure. For the lung cancer, the Panel found that it was unlikely that it was related to asbestos exposure because of the short period of time the Worker was employed at DOE. The Panel cited the Worker's 44-year history of smoking as a likely cause of his lung cancer. For the asbestosis, the Panel determined that the Worker did not have the illness because there was no evidence of the presence of fibrosis or nodular infiltrates. For the COPD, the Panel agreed that the Worker did have COPD. However, the Panel noted that there was no evidence that the Worker had any respiratory problems during his short period of employment at DOE. The Panel cited the Worker's long smoking history as the likely cause of his COPD. For the skin cancer, the Panel noted that the record does not contain information on the type or location of any skin

cancer the Worker may have had, although there is a mention that skin cancer was treated in 2000. The Panel stated that outdoor painters are prone to certain types of skin cancer on certain parts of the body due to sun exposure. However, the Panel stated that it was unlikely that the illness was a result of the Worker's employment at DOE given that the Worker's period of employment at DOE was only a small portion of his total work history and sun exposure history. For the mycosis fungoides, the Panel stated that the illness is not caused by occupational exposures to toxic substances.

The OWA accepted the Physician Panel's negative determinations on the claimed illnesses. The Applicant filed the instant appeal.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

In her appeal, the Applicant maintains that the negative determinations are incorrect. First, the Applicant argues that the Worker worked at DOE for a longer period of time than that mentioned by the Panel. Second, the Applicant argues that she does not understand how the Panel can give a positive determination for pleural plaques and a negative determination for asbestosis. For the reasons stated below, the Applicant's arguments do not present a basis for finding panel error.

First, the Panel considered the dates of the Worker's employment as they were found in the record. According to DOE employment records, the Worker's dates of employment were as follows: 5/2/55 - 7/15/55; 12/27/55 - 3/23/56; 3/8/57 - 5/17/57; 8/7/61 - 10/26/62. Record at 10. The Panel's failure to consider a longer period of employment was not error. If the Applicant has evidence that establishes a longer period of employment, she should contact the DOL for information on how to proceed.

Second, the Panel was not inconsistent when it rendered a positive determination for pleural plaques consistent with asbestos exposure and a negative determination for asbestosis. Pleural plaques are considered a precursor to asbestosis; the two illnesses are not synonymous. The Panel explained why it found that the Worker did not have asbestosis and the Applicant has failed to challenge the accuracy of that explanation. Accordingly, the Panel's finding that the Worker had pleural plaques but not asbestosis does not indicate panel error.

As the foregoing indicates, the appeal does not present a basis for finding panel error and, therefore, should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0200 be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: February 1, 2005